"With reference to the above matter our clients will be convening the Annual General Meeting in accordance with the order of court dated 17th February, 1973.

We shall therefore, be pleased if you will let us have the subscription for 1973 from your clients and the 176 members together with the list of the relevant members in order that the meeting can be convened in terms of the order."

In my view, the above letter is not merely an attempt to comply with the interim order but also an admission to judgment as far as the interim injunction is concerned. However, to enable the defendants to call the proposed annual general meeting and to comply with the interim order, which is merely prohibitory in nature, it is obviously necessary that they should be supplied with the names and particulars of the 176 other interested persons so that they could be served with the notice of the meeting and allowed to participate and vote in accordance with the Malaysian Indian Congress Constitution. Accordingly, on October 8, 1973 I made an order in favour of the plaintiffs under Order 32 Rule 6 of the Rules of the Supreme Court in terms of their Notice of Motion on condition that the particulars of the 176 persons are filed within one week from the date of the order.

By Notice of Motion dated October 22, 1973, the defendants made the present application for an order that the plaintiffs' application vide Notice of Motion dated August 9 be dismissed with costs on the ground that the order made by the court in favour of the plaintiffs was a conditional one and that the plaintiffs had failed to comply with the condition imposed. Mr. Vadiveloo for the plaintiffs conceded that the order was a conditional one but contended that the plaintiffs had complied with the condition. The issue in this case, therefore, was whether the plaintiffs had not complied with the condition imposed, *viz.* filing the particulars of the 176 persons within one week of October 8, 1973. The plaintiffs did serve the defendants with a list containing 176 names within the prescribed time. (See list annexed to affidavit of third plaintiff dated October 15, 1973). As stated earlier on, the purpose of the condition was to enable the defendants to serve the notice of the proposed meeting to the 176 affected persons whom the plaintiffs alleged should be given the right to participate and vote. Mr. Vadiveloo submitted that since the names of the 176 persons had been supplied to the defendants, they had thereby complied with the conditional order. It is true that the list supplied by the plaintiffs contained the names, N.R.I.C. numbers and membership numbers of the various persons, but the defendants alleged that the plaintiffs had merely conjectured the list. On this particular allegation, Mr. Vadiveloo conceded that one of the 176 names in the list was not genuine and that some of the membership numbers were incorrect. On that admission alone, how can it be said that the plaintiffs had complied with the conditional order? In my view, the particulars required to be filed by the plaintiffs should not only contain the correct names of the 176 persons but also their correct particulars, such as address and membership number. The plaintiffs' writ was filed on March 2, 1973, and it is inconceivable that as late as October they appeared to be in difficulty in securing the true particulars of the 176 persons whose right they alleged would be affected if the interim injunction had not been granted.

Under the circumstances, I hold that the plaintiffs had failed to comply with the condition imposed under the Order of Court dated October 8, 1973. By virtue of such failure, I direct that the conditional order had been waived or abandoned by the plaintiffs under Order 42 Rule 2 of the Rules of the Supreme Court. The consequence of this order would be that the proper hearing of the plaintiffs' claim should be heard on January 2, 1974 as already fixed.

Order accordingly.

Solicitors: *Dato Clough Thuraisingham, Raj & Co.; Xavier & Vadiveloo.*

N.Y.F. REALTY SDN. BHD. v. COMPTROLLER OF INLAND REVENUE

[A.C.A. (Sharma J.) February 20, 1974]
[Ipoh — Originating Motion No. 19 of 1971]

Income Tax — Purchase and resale of property — Whether taxpayers holding properties as investments or were trading — Criteria for distinguishing between taxable and non-taxable selling profits — Findings of facts — Questions of law — Failure of Special Commissioners to make finding on essential facts — Case remitted to Special Commissioners — Income Tax Act, 1967.

This was a case stated by the Special Commissioners and the only question was whether the appellants were holding their immovable properties as investments or were trading and/or carrying on a business of purchase and sale of lands. It appeared that there were certain essential facts on which the Special Commissioners had failed to give their findings.

Held: the case should be remitted to the Special Commissioners to make their findings on the essential facts.

Cases referred to:-

(1) *Farmer* v. *Cotton's Trustees* [1915] A.C. 922.

(2) *Ochberg* v. *Commissioner of Inland Revenue* (1931) 5 South African T.C. 93.

(3) *Commissioner of Taxation* v. *G's Estate* (1965) 27 South African T.C. 9.

ORIGINATING MOTION.

N. T. Rajah for the appellants.

Abdullah bin Ngah (Senior Federal Counsel) for the respondent.

Sharma J. (delivering oral judgment): This is a case stated by the Special Commissioners and the only question involved in this appeal is whether the appellants were holding their immovable properties as investments or were trading and/or carrying on a business of purchase and sale of lands they had acquired. Profits derived from the purchase and resale of property are not, *per se*, subject to income tax. While the Act does not specifically exempt capital gains or otherwise exclude such gains from income, the courts have held that the mere realisation of capital appreciation is not income under the ordinary concepts and usages of mankind. However, the Act (*i.e.* the Income Tax Act) does require that taxable income shall include: —

(1) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit making by sale; or

(2) profit arising from the carrying on or carrying out of any profit making undertaking or scheme.

Most of the cases which have been decided on the subject have involved the application of the first of the above requirements. In determining the application of these requirements the focal point of enquiry is the *dominant purpose for which the particular property was originally acquired.* If it is established that the dominant purpose in the acquisition of property was its resale at a profit, the presence of other purposes, such as the rental of that property does not remove any profit on ultimate sale from the taxable area.

Again the mere presence of an intention to sell property at a profit at some future date is not, of itself, sufficient to cause the profit to be taxable if the dominant motive in purchasing the property was not expectation of profit by sale.

It has been said that "the criterion for distinguishing between capital and income is flexible, if not vague, and for that reason unsatisfactory." Transactions in property carried out by established businesses seldom give rise to any difficulty if the property concerned is of the type normally dealt with by the business. The profits of the sale are clearly income rather than capital. If the property concerned has been used in the business as fixed assets such as land and buildings the profits of sale are normally capital and non taxable except to the extent that any recovery of depreciation previously allowed or allowable may be included in the income. The mere fact that property which has been used in a business is resold at a profit does not cause the profit to be taxable as "from the carrying on of a profit making undertaking" since the profit making undertaking of a business only incidentally involves the resale of its fixed assets.

The following criteria for distinguishing between taxable and non taxable selling profits are useful in determining the question: —

(1) *Subject matter of the transaction.*
Property which does not yield income or personal enjoyment to its owner merely by virtue of its ownership, and which is normally the subject of trading and rarely the subject of investments, is more likely to have been acquired for the purpose of resale at a profit than property which does yield such income or enjoyment;

(2) *Period of ownership.*
The fact that property is held for but a short time after its acquisition may tend to indicate that the purpose of acquisition was resale at a profit;

(3) *Frequency of transactions.*
If there had been a number of transactions in the same kind of property it may be presumed that the taxpayer's purpose in purchasing the particular property was its resale at a profit;

(4) *Alteration of property to render it more saleable.*
The fact that material alterations or improvements have been made to property or that its character or quality has been changed so as to render it more merchantable would tend to indicate that the property was derived from a profit making undertaking or scheme. However, if the property was clearly acquired for other purposes, extensive activities to render it more saleable after it is no longer useful for such original purposes would not cause any selling profit to be taxable;

(5) *Methods employed in disposing of property.*
If special exertion is made to find or attract purchasers such as the opening of an office or advertising extensively, such facts tend to indicate the presence of a profit making undertaking. However, such facts would not of themselves cause the profit to be taxable if the original purpose in acquiring the property was to use it rather than to resell it at a profit;

(6) *Circumstances responsible for sale.*
If sale of property is occasioned by sudden emergency or unanticipated need for funds, such facts will tend to indicate that the property was not acquired for the purpose of resale at a profit and that the sale was not pursuant to a profit making undertaking or scheme.

I do not propose to go into the facts of this case or to express any opinion thereon as the course I have decided to adopt is to remit this case back to the Special Commissioners. I am doing so because I consider it my duty to guard myself against expressing any opinion which may tend to influence the minds of the Special Commissioners.

It has been very strongly urged upon me by the learned counsel for the respondent that the deciding order of the Special Commissioners is entirely based on findings of fact and as such this court cannot, and, in fact, it has no power to interfere with the decision made on such findings by the Special Commissioners. I will first, in a general way only, deal with that aspect of the case. The test to be applied in distinguishing questions of fact from questions of law is indeed a matter of great difficulty. Lord Parker in the case of *Farmer* v. *Cotton's Trustees*[1] suggested the following test. He said:

> "... where *all* the *material facts* are *fully found*, and the *only question* is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only." (italics supplied.)

A question that depends for its answer on matters of degree, on what weight is to be given to this and that variable factor, like factors of duration, repetition, scale of operations, is ordinarily answerable only for the particular case and is therefore a question of fact. Whether or not facts and evidence produced before the Special Commissioners lead to the conclusion that the taxpayer was or was not carrying on the business or trade within the meaning of the law depends on inference from facts. The inference to be drawn from the acts and conduct of the taxpayer, *i.e.* whether he carried on a trade or business is, in my view, a question of law. The inference drawn by the Special Commissioners that a particular taxpayer was carrying on a business or trade cannot bind the court, as such an inference can only be derived from other primary facts. Therefore, even if the Special Commissioners do specifically state that the taxpayer was carrying on the business of a land jobber the court is entitled to enquire into the correctness of that conclusion by con-

sidering the same facts from which the Special Commissioners drew their inference. Reference may be made to the South African cases of *Ochberg* v. *Commissioner of Inland Revenue*[2] and *Commissioner of Taxation* v. *G's Estate*.[3] In the latter case it was said:

"All the relevant facts were found by the Special Court. The only question was whether on these facts the deceased could be said to be 'carrying on business' and that is a question of law. . . ."

The question of what the intention of a taxpayer was when he acquired an asset, *i.e.* whether he bought it as an investment or with a view to selling it at a profit, is a question of fact. It has to be determined by inference from proved facts and such an inference is one of fact and not of law. Where, however, the intention of the taxpayer does not depend merely on inference from facts but depends largely on the construction of documents, *e.g.* an agreement or Memorandum of Association that raises questions of law.

I agree with the learned counsel for the respondent that findings of fact are only assailable if there was no evidence on which the findings could be properly reached, or if it can be shown that it was a finding of fact at which no reasonable person could arrive.

It was the duty of the Special Commissioners to have considered every relevant fact *both for and against* the appellant with due care and if they failed to take into consideration some material evidence or had overlooked some crucial fact, their act amounted to a misdirection in law. In such an event it is the duty of the court to interfere and in a proper case the decision of the Special Commissioners can be set aside on that ground.

There were certain essential facts in this case on which it was the duty of the Special Commissioners to have applied their minds and to have given their findings. Only after due consideration of those material facts could they have come to their findings, one way or the other. I find from the record that in this case they have: —

(1) failed to consider and find what was the intention of the appellants at the time of the acquisition by them of the lands — whether the lands were acquired for the purpose of resale or as a pure investment;

(2) failed to consider the effect of certain vital and relevant entries in the balance sheets and statements of accounts which were at least capable of indicating the intention of the appellants and whether that intention (if it was there) had at any time changed from investment to resale for profit. It would appear that the sale proceeds from the lands were utilised by the appellants either for payment of debts or for reinvestment in a fixed deposit account.

(3) failed to consider that the appellants were throughout the relevant period a company wholly comprised of those shareholders who were members of a single family;

(4) failed to consider and give a finding thereon whether the appellants after their formation bought any land from any stranger or a person who was not a shareholder of the company or a member of the family of Ng Yin Fong;

(5) failed to take into consideration the interval of time between the buying or acquisition of lands and their respective resales.

These were some of the very vital and important matters on which the Special Commissioners should have given their findings or at any rate they were matters which they should have adequately considered. The record does not show that any thought or consideration was given to any of these matters. Although I have the powers to interfere and come to my own findings I am in the circumstances reluctant to do so as the primary duty to come to findings of fact lies on the Special Commissioners. The case is consequently remitted back to the Special Commissioners.

I understand some of the Special Commissioners are no longer available to serve. The case may consequently be dealt with *de novo* by another set of Special Commissioners.

The costs of this appeal will abide the result of findings and the decision which may be arrived at by the Special Commissioners as a result of this order or an appeal, if any, therefrom.

Order accordingly

Solicitors: *Maxwell, Kenion, Cowdy & Jones.*

IN THE ESTATE OF SHAIKH MOHAMED BIN ABDUL RAHMAN BIN HAZIM

[O.C.J. (Chang Min Tat J.) April 25, 1974]
[Penang — Originating Summons No. 33 of 1972]

Muslim Law — Marriage — Validity of — Non-compliance with provisions of Administration of Muslim Law Enactment, 1959, ss. 114, 115 & 116.

In this case the applicant applied as the husband of a named beneficiary in the will of the deceased, and as a person interested in the administration of the estate. The respondents, the executors and the trustees of the estate, opposed the application and the first respondent denied that the applicant was the lawful husband of the named beneficiary.

Held: (1) on the facts the applicant's deceased wife Hanifah binte Abdul Aziz alias Aminah binti Abdul Aziz was one and the same person as Hanifah binti Shaikh Abdul Aziz, the beneficiary in clause 4(c)(ii) of the will of the deceased;

(2) even though the conditions of sections 114, 115 and 116 of the Administration of Muslim Law Enactment were not complied with in this case, the marriage was valid, as the respondents had failed to rebut the presumption in favour of the validity of the marriage.

Case referred to:-

(1) *Bowler* v. *John Mowlem & Co. Ltd.* [1954] 1 W.L.R. 1445, C.A.

ORIGINATING SUMMONS.

A. Muttiah for the applicant.

B. S. S. Kanda for the first respondent.

K. Ahmad for the second respondent.

Chang Min Tat J.: This is an application by originating summons made by the husband of a named beneficiary in a will, as a person interested on the death of his wife in the reliefs sought for (a)